IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION

UNITED STATES OF AMERICA,

v.

NELSON BUNKER HUNT AND W. HERBERT HUNT

Docket No. CR 5-485

Memorandum Opinion

The defendants are charged with willfully, knowingly and unlawfully intercepting and endeavoring to intercept wire communications of persons calling to and from telephones located at the residences of six different persons in Dallas, Texas, in violation of Title 18, United States Code, section 2511(1)(a) and section 2. A separate count charges such a violation for each of the six telephones.

The defendants have duly filed a motion to suppress certain evidence, alleging that it was acquired in a manner which was violative of their rights under the fourth amendment. Specifically, they seek to prevent the admission by the government of any evidence obtained in or as a result of the search of a red Ford Mustang in Richardson, Texas on or about January 16, 1970. More specifically, the defendants complain of the seizure of a certain tape recorder from that automobile and the subsequent playing of the recording tape located thereon by the Richardson police and the Federal Bureau of Investigation. The contents of this tape alerted the investigating authorities to the violations alleged in the indictment.

Patrick W. McCann III and Jon Joseph Kelly have previously been charged in a four-count indictment flowing from four of the wire interceptions involved in the present case. McCann and Kelly were convicted in another court and sentenced to 3 years in prison. Their conviction was affirmed by the United States Court of Appeals for the Fifth Circuit in *U.S.* v. *McCann*, 465 F.2d 147 (5th Cir.

1972). The trial court denied the defendant's motion to suppress in that case and the denial was specifically reviewed and affirmed by the Court of Appeals in its opinion. The defendants Hunt are, however, certainly entitled to a separate and *de novo* consideration of their motion to suppress by this court.

Defendants have been afforded two evidentiary hearings in this case during which much testimony and several documents were introduced by both sides. After considering that evidence, along with the briefs and oral arguments of counsel, the court files this Memorandum Opinion which shall constitute the Findings of Fact and Conclusions of Law pertinent to defendants' motion to suppress.

Factual Background

For several days prior to the arrest of Kelly and the search of the Mustang on January 16, 1970, the Richardson Police Department had received several complaints from residents of that city that certain automobiles would be left unattended on residential streets for periods of a day or so and that then another automobile would be substituted for the first and similarly left unattended until it too was replaced. An investigation by the Richardson police revealed that all of these automobiles had been rented by certain persons who gave various hotels as their local addresses but listed fictitious Houston home and business addresses. The police also determined that these persons changed hotels more than once during the period in which the car switching occurred. A factor which was considered to be significant by the police was the presence of an identically arranged pile of newspapers several inches high and on a level with the transmission hump on the right front floorboard of all of the involved vehicles.

According to the testimony, the investigating officers discussed these facts periodically (there is conflicting testimony as to whether these discussions were daily or

weekly) at meetings held between shift changes. Included among various interpretations of these facts that were discussed were the possibilities that these cars were being used as a "narcotics drop," that they were being used in conjunction with a scheme to burglarize residences in the area and that they were somehow being used by private detectives involved in a domestic investigation. These facts had been communicated to George M. Taylor, the arresting officer, through these various meetings and discussions prior to the time of the arrest.

On January 16, 1970, officer Taylor was assigned to conduct a "stake-out" and surveillance of the Mustang, which was one of the cars that had been left unattended by the suspects on this particular day. He relieved officer Ray Pennington, who had been watching the parked Mustang during the day, and parked his own automobile in the driveway of a nearby residence, out of the view of anyone in or standing next to the Mustang. At the September 17, 1973 hearing on the motion to suppress, Taylor testified that, on the basis of the facts determined by or communicated to him, he "would go out there and do it and set up surveillance" and also that he was "going to stop the car and, if somebody came to pick it up, talk to them." (Transcript, p. 30) He further testified that, at that time, he had no knowledge that a crime was being committed by anyone connected with the automobile-switching.

About 5:00 P.M. on this same day Taylor observed a man approach the Mustang, stop near it, stoop to pull up his socks, look at all the tires and, finally, get in it and drive away. Taylor then followed the Mustang but he admitted that to this point the driver appeared to be engaged in purely legal activity. However, Taylor then switched on the red lights on his car so that the man in the Mustang would pull over for questioning. Taylor testified that the driver of the other car ran a stop sign before he pulled over to the curb and stopped. It should be noted that Jon

Joseph Kelly, who in fact was the driver of the Mustang at this time, testified that he did not run a stop sign. Taylor further stated that Kelly did not attempt to escape or in any other way avoid the officer's signal to stop. After Taylor stopped his car within a few feet of the Mustang, both drivers stepped out of their cars and met about midway between the vehicles. Taylor stated the he immediately informed Kelly that he was being charged with running a stop sign and with violation of "the suspicious persons ordinance." Interestingly, both of these charges were later dropped. Upon the officer's request, Kelly produced a valid Texas driver's license.

From this point there are significant contradictions between the testimony of the two men. Taylor testified that he asked Kelly "would it be okay if I go ahead and look in the car" that Kelly replied, "okay, go ahead." (Transcript, pp. 48, 49). Kelly, however, testified that Taylor did not seek permission to search the car but rather stated that, "I'm going to look in your car, I want to see what's in it, I want to see what's under the newspapers." Kelly flatly denied that he granted permission for the search.

In any event, officer Taylor walked to the driver's side of the car, leaned across the front seat and unlocked the passenger door. At that point Taylor noticed a green briefcase protruding from beneath the pile of newspapers on the floorboard. Taylor testified that he then asked Kelly what was in the briefcase, to which the reply was, "I have no idea." Taylor also stated that Kelly told him that a friend had dropped him off at the Mustang but that he did not know the friend's name nor could he further identify him. He then lifted away the newspapers, opened the attaché-type briefcase and discovered a tape recorder located therein.

Taylor testified that Kelly was close behind him during this search but Kelly contended that he had remained at his original position between the automobiles. Taylor

testified that he asked Kelly certain questions, among which was whether he was a private investigator working on a divorce case. According to Taylor's version of this episode, Kelly's reply was, "I think I need to call my attorneys," and at this point Taylor decided to arrest Kelly. Kelly, though, has denied requesting an attorney until he reached the police station, sometime later. Taylor then instructed Kelly to get inside the police car. By this time other officers had arrived to assist Taylor, and one of them drove the Mustang, which still contained the briefcase and recorder, to the police station. The car was parked in the station house lot and locked, and the keys were delivered to officer Taylor. Taylor reported to his supervisor, officer Burleson, and then retrieved the briefcase from the locked Mustang, without further seeking permission from Kelly or any other person. Taylor's testimony reveals that at this time he still did not have specific knowledge that a crime had been committed.

At no time did any of the investigating officers apply for or obtain a warrant to search or seize the Mustang or any of its contents nor, more pertinently, did they seek a warrant to search the seized tape by playing and listening to it. The evidence establishes, however, that a Magistrate or Justice of the Peace was located within five or six miles of the police station and, therefore, that the search warrant procedure was readily available to the police.

Despite the proximity of a Magistrate, officers Taylor and Burleson did indeed listen to the tape on this same day, and the record indicates that they were able to identify one of the persons whose voice was recorded on the tape. The officers then notified a security officer at the offices of Southwestern Bell Telephone Company, who in turn notified Special Agent Holloman of the F.B.I. After arriving at the police station about 7:00 P.M., Holloman listened to the tape and then accompanied Burleson to the Richardson home of a Mr. Rothermel, whose wife identified her voice

as being one of those on the seized recording. Employees of Southwestern Bell then located a transmitting device on the telephone pole behind the Rothermel home which was used to transmit signals from their telephone line to the recorder in the nearby car.

Subsequently Mr. McCann was arrested and Kelly's motel room was searched pursuant to a warrant. Defendants recognize that this court is bound by the validity of the search affidavit as far as the face thereof is concerned, but they do contend that the probable cause for the issuance of the warrant was based solely upon facts which were obtained through the allegedly invalid playing of the seized tape and misleading facts, and, therefore, that any evidence seized from the hotel room should be suppressed under the doctrine announced in *Silverthorne* v. *United States,* 251 U.S. 385 (1920), popularly referred to as the "fruits of the poisoned tree' doctrine.

McCann also testified that the defendants in this case had reimbursed Kelly and McCann, or the detective agency for which they worked, for all of the expenses of their investigation. These expenses included the rental fees for the cars involved, rental of the various motel rooms, and cost of the several tape recorders which were used and a quantity of recording tape. Edited tape recordings containing pertinent recorded conversations were to be given to the Hunts. McCann further testified that it was his understanding that the recorders, the tapes and all the other equipment used in the surveillance for which he was reimbursed belonged to the Hunts. Other personnel of the detective agency, Clyde Wilson & Associates, corroborated McCann's testimony as to payment for and ownership of the equipment.

The findings of this court as to the facts surrounding the arrest and detention of Kelly, the search of the Mustang and the briefcase therein, are substantially identical to the findings made by the Court of Appeals in its opin-

ion in *United States* v. *McCann, supra.* However, the defendants herein assert that additional evidence and legal grounds have been presented to this court that are sufficient to compel the granting of their motion to suppress, notwithstanding the denial of a similar motion in the Kelly-McCann case. The pertinent additional evidence appears to be as follows:

A. Arresting officer Taylor's testimony at the September 17, 1973 hearing that he would not have arrested Kelly if Kelly had answered that he was working on a divorce case;

B. Taylor's statement that he definitely decided to arrest Kelly only after Kelly asserted his sixth amendment rights by stating that he wanted to see his lawyer;

C. Taylor's testimony that when he left the Richardson police station on the afternoon of January 16, 1970 to stake-out the Mustang, he intended to stop and interrogate anyone who attempted to drive away in the car, even though he had no knowledge that a crime was being committed at that time;

D. Kelly's previously unoffered testimony that he did not give anyone permission to search the car and that he did not tell officer Taylor that he wished to see his lawyer.

The defendants' position is that the additional evidence shows that the arrest of Kelly was a sham since it was not based upon probable cause. Defendants also contend that the ensuing search of the automobile and playing of the tape were invalid under the fourth amendment.

Although it may be that had this additional evidence been originally presented to the District Court during the hearing on the motion to suppress by McCann and Kelly, that that court and the Court of Appeals would have granted the motion, this court feels, especially in view of the contradictory evidence between Taylor and Kelly,

that the decision of the United States Court of Appeals for the Fifth Circuit in *McCann, supra,* should control insofar as it is applicable to the points raised in that case. However, as will later appear, this court feels that there are certain legal matters and facts which were neither urged nor considered in that case, but which have a material bearing on the matter now before the court. In any event, this court concludes that officer Taylor had reasonable grounds to stop the Mustang and make a general investigative inquiry of its driver and that after the car was stopped there was either consent or probable cause to search the car. The search of the briefcase when it was located on the floorboard of the Mustang at the point of arrest was also authorized for the opinion of the Fifth Circuit held that

> "Detective Taylor would have been derelict in his duty had he not opened the briefcase."

However, the defendants in this case are entitled to have this court consider their motion to suppress based upon the testimony that has been presented to this court in the two evidentiary hearings. Along with the additional evidence delineated earlier the defendants raise the following evidence and legal arguments which were neither presented to nor considered by either the trial court or the appellate court in the *McCann* case:

Officer Burleson and officer Taylor, after the car had been locked and stored at the police station, obtained the briefcase, opened it, and played the tape found on the recorder. Subsequently, agent Holloman of the Federal Bureau of Investigation played the tape. None of these officers attempted to obtain a search warrant authorizing them to search the tape recording. Defendants take the position that the playing of the tape without a search warrant violates the defendants' fourth amendment rights and that the evidence secured by the prosecuting authorities by rea-

son of the information they obtained from this tape should be suppressed. The court finds that this point was not raised in the *McCann* case and that the opinion does not indicate that the Court of Appeals in any way considered the question of whether or not the playing of the tapes without a warrant was a violation of the defendants' fourth amendment rights.

This court is of the opinion that the position of the defendants is sound and that the motion to suppress should be granted. The court's reasoning is set out below.

STANDING

A threshold issue in this case is whether or not the defendants have "standing" to challenge the validity of the search, since they were not present at the scene. The Supreme Court of the United States in *Jones* v. *United States,* 362 U.S. 257 (1960), in construing the right of a person to assert fourth amendment rights by a motion to suppress filed under Rule 41(e), Federal Rules of Criminal Procedure, stated:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed to someone else."
>
> "To establish 'standing', courts of appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."

A case squarely in point on this issue of standing is *United States* v. *Jeffers,* 342 U.S. 48 (1951). That case involved a seizure of narcotics belonging to the defendant from an apartment which was not his residence, in which he had no

proprietary or possessory interest and in which he was not present during the search. Justice Clark, writing for the Supreme Court, held that defendant's property interest in the seized contraband was sufficient to support his standing to move for suppression of the evidence. The United States District Court for the Western District of Pennsylvania in 1957 held in *United States* v. *Lester,* 21 F.R.D. 376, affirmed 282 F.2d 750 that "one has the requisite standing as a person aggrieved if he claims *ownership* of the seized property, although the premises searched belonged to another." (emphasis added) The Sixth Circuit in 1965 in *United States* v. *Thomas,* 342 F.2d 133 stated that if an accused neither owned, possessed nor lived at the searched premises, was not present at the time of the search, and did not show any possessory interest in the objects seized, then he would have no standing to challenge the search. Mere ownership of a searched automobile gives standing, even when the owner is not present at the search. *Cash* v. *Williams,* 455 F.2d 1227 (6th Cir. 1972). In denying standing to an accused in *United States* v. *Banks,* 465 F.2d 1235 (5th Cir. 1972), the Court held that the defendant could not prevail under Rule 41(e) since he did not have sufficient propriety interest in the premises searched or possessory interest in the property seized.

The uncontradicted evidence produced at the evidentiary hearings in this court can lead only to the conclusion that the Hunts owned, and thus had a proprietary interest in, the tape recorder and tapes since they ultimately paid for both the tape recorder and the tapes. This proprietary interest is sufficient to give the Hunts standing to challenge the search and the evidence gathered thereby.

The government contends that *United States* v. *Johnson,* 456 F.2d 295 (5th Cir. 1972) is a "white horse" case and that it conclusively supports their position. The reasoning in *Johnson,* though, is inapplicable to the case *sub judice.* The Court of Appeals there held that the appel-

lant had no standing to challenge the search, but there was no evidence in that case that he had a proprietary interest in either the seized contraband or the searched van. Furthermore, *Johnson* is distinguishable from *Jones* v. *United States, supra,* because the former case did not involve a crime of possession and the appellant was not present during the search.

The court having determined that the defendants have standing to challenge the search in question, the next question to consider is the validity of the search.

VALIDITY OF THE SEARCH

In *Johnson* v. *United States,* 333 U.S. 10 (1947), the Court stated:

> "The part of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

It is well established that searches conducted outside of the judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions. *Katz* v. *United States,* 389 U.S. 347 (1967); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *United States* v. *Graves,* 477 F.2d 1306 (5th Cir. 1973).

In determining whether or not the search of the tape recorder (*i.e.*, the playing of the tape found thereon) comes within one of the exceptions to the general requirement of a search warrant, the court has kept in mind that the Court of Appeals has already approved the procedures of the police in this case up to and including the opening of the briefcase. Therefore, this court must now examine the circumstances surrounding this latter search in light of the exceptions to the general rule.

The Sixth Circuit has delineated very explicitly these "exigent circumstances" exceptions to the general requirements of a search warrant in *United States of America* v. *Nelson*, 459 F.2d 884 (6th Cir. 1972), as follows:

(1) *Search of an Automobile*

The search involved in this case cannot fall within this exception. The traditional basis for this exception is the inherent mobility of an automobile and the consequent danger that the vehicle and its contents may be moved before a search warrant can be obtained. *See Carroll* v. *United States*, 267 U.S. 132 (1925) and *Chambers* v. *Maroney*, 399 U.S. 42 (1970). This rationale is inapplicable here, however, because the automobile and its contents were validly seized at the scene of the arrest and transported to the police station. The recorder and the tape were then carried into the station house, where the tape was played. Thus the search was conducted not at the point where the automobile was seized but later in the police station and, had the police delayed the search of the tape in order to obtain a search warrant, there would have been no danger that the tape could have been carried away in the automobile.

(2) *Incident to Lawful Arrest*

The search of the tape recorder and the playing of the tapes was not made incident to a lawful arrest. *See Chimel*

v. *California,* 395 U.S. 752 (1969). The search was not made at the scene of the arrest and in fact was made some two hours later after Kelly had been arrested and locked in his cell in the city jail. The Fifth Circuit in *United States* v. *Davis,* 423 F.2d 974 (1970), held under somewhat similar circumstances that there was no justification for search without a warrant. In that case a search was conducted three and a half hours after the arrest of the accused, and while searching for the pistol the police went to his home and without a warrant searched the home. The Fifth Circuit held that, to be incident to an arrest, the search must be justified by the need to seize weapons or the need to prevent the destruction of evidence, but that these justifications are lacking where the search is remote in time or place from the point of arrest.

It would be unreasonable to hold that, although the tape recorder was seen and discovered at the place of arrest, that the playing of the tape thereon was also incident to arrest when there was absolutely no danger of its destruction, it was in the possession of the police and the driver of the car was in jail, and there is no indication that the search was in any way connected with a seizure of weapons or an attempt to prevent the escape of Kelly or anyone else.

In *Brett* v. *United States,* 412 F.2d 401 (5th Cir. 1961), the appellate court held that a search of an accused's clothing, which had been placed in custody of the jailer in the prisoners' property room, made three days after arrest was invalid. The court held that this search was not incident to arrest and was not even close to or contemporaneous with the time of arrest. In that case the Fifth Circuit held that none of the circumstances justifying application of the "search incident" exception were present because there was no danger that the clothing would be removed nor that they concealed weapons which could be used by the defendant in an escape attempt and there was ample time to obtain a search warrant. The same statements and findings can be applied to the case under consideration by

this court. The court went on to hold: "Focus in the Fourth Amendment today is on privacy rather than on property rights." *Id.* at 406. The Fifth Circuit in a subsequent case, *United States* v. *James*, 432 F.2d 303 (1970), found that a search made after the time of arrest and at a different place from the arrest itself was necessary for effective law enforcement and that such effective law enforcement would have been frustrated if there was any delay as there were conspirators possibly still at large. Of course *James* can be distinguished from *Hunt*, because at the time of the search in the latter case, the police could have had no indication that there were co-conspirators loose who might escape.

In *Chimel* v. *California, supra*, the Court, in holding the warrantless search of a room invalid, quoted *Trupiano* v. *United States*, 334 U.S. 699 (1948), which stated:

> "A search or seizure without a warrant as an incident to lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of arrest. But there must be something more in the way of necessity than merely a lawful arrest."

Id. at 759. The requisite necessity is clearly lacking in the present case.

(3) *Plain View Doctrine*

The plain view doctrine is not applicable here. *See Harris* v. *United States*, 390 U.S. 234 (1968). Although the briefcase was seen by the officer while engaged in the lawful search of the car, this court does not hold that the seizure or opening of the briefcase was unlawful, but that it was the playing of the tape itself, (without authority of a properly issued search warrant) that this court holds to be unwarranted.

The government has argued that the contents of the tape were in plain view, just as would be the writing on a piece

of paper. That argument is illogical, however, for there are obvious intrinsic differences between the two. This court holds that the playing of the tape was a separate search in itself and that the recorded conversations were not in the "plain view" of the investigating officers. The government further argues that the playing of the tapes was an analysis of lawfully obtained evidence to determine whether it was an instrumentality of crime rather than a search for evidence. The prosecution compares the playing of the tape to dusting for fingerprints, analyzing suspected narcotics, and testing blood found on weapons. This attempted analogy is not persuasive to the court. The government's semantics are not sufficient to overcome this court's opinion that the playing of the tape was a search of the tape recorder for the purpose of finding incriminating evidence.

(4) *Consent*

Of course, if anyone having authority to do so had consented to the playing of the tape, then the search would have been valid even without a warrant. *Frazier* v. *Cupp,* 394 U.S. 731 (1969). The only person that could have given consent in this case was Kelly. Even if Taylor's version of what happened at the scene of arrest is accepted, that is that consent to look into the car was obtained, this cannot be construed as consent to play the tape. Consent is clearly not present under the facts of this case.

(5) *Immediate Threat of Life*

Again, at the time this tape was played no one accused or under suspicion in this case, was in close proximity to either the tape recorder or the tape. Only Kelly was present at the police station and he was incarcerated during the search. To state that it was necessary to play the recorder and the tape thereon in order to prevent an immediate threat to life would be absurd. *See Terry* v. *Ohio,* 392 U.S. 1 (1968).

(6) *Officers in Hot Pursuit of a Fleeing Felon*

The only pursuit involved in this case was the initial pursuit by Taylor of Kelly when he drove away in the Mustang. Even had the search taken place immediately after that pursuit, the exception would not apply because Taylor had no knowledge that Kelly had committed a crime. Regardless, the search with which this court is concerned took place two hours later at the police station and was in no way connected with the initial pursuit. *See Warden, Md. Penitentiary* v. *Hayden,* 387 U.S. 294 (1967).

Exigencies of the Situation

Although the above-discussed categories have been listed as exceptions to the search warrant requirement of the Fourth Amendment, the reported cases also hold generally that "exigent circumstances" must be present before a warrantless search may be conducted. *See,* e.g., *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). While the six categories are in fact examples of "exigent circumstances," this court is of the opinion that a more general analysis of the exigencies in the case at bar is required.

In 1948 the Supreme Court of the United States held in *McDonald* v. *United States,* 335 U.S. 451, at page 456, that:

> "We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative."

It is well settled that the burden is upon the United States of America to show an exception to the rule that a search without a warrant is *per se* unreasonable. To do so exigent circumstances must be shown to have existed.

In *United States of America* v. *Arturo Garay, et al.,* 477 F.2d 1306 (5th Cir. 1973) at page 1308 the court held:

> "While the exigencies of the situation may well have justified the warrantless detention of appellants, they

> cannot validate the search of the suitcases made at the time when appellants were under restraint, if not under formal arrest. At that point, appellants were incapable of concealing or destroying the suitcases or their contents. Nor was there any significant probability that the suitcases would escape search by being moved to Chicago or Detroit aboard the airplane. . . . "

In that case the appellants had been arrested at an airport and their two suitcases had been loaded aboard their plane. The luggage checks were in the possession of the police and even there the search of these suitcases without a warrant was declared invalid. The court went on to hold:

> "In short, the officers could and should have held the bags until they obtained a warrant authorizing an examination of the contents."

Id. at 1308. Further, this court is of the opinion that the motion to suppress in this case should be granted under the holding of the Fifth Circuit in *United States of America* v. *Soriano, et al.*, 482 F.2d 469 (5th Cir. 1973).

There the officers had observed the defendants place three suitcases in the trunk of a taxicab. The court held that the officers' previous knowledge justified the stopping of the taxicab and the arrest of the accused. The officers also took the suitcases from the trunk and on the scene opened and searched them. It was held that the agents had probable cause to believe that the occupants of the taxicab were carrying narcotics and they were justified in opening the trunk and removing the suitcases and could seize the suitcases. However, the crucial question there was whether the officers could open and search the validly-seized suitcases without first obtaining a warrant. The court, after holding that the suitcases were effects under the Fourth Amendment, held that the search was invalid.

The government argued that the exigent circumstances required an immediate search without a warrant and that

in any event no warrant was needed to search personal property after that property had been validly seized. The court expressly rejected both contentions and, with respect to the right to search personal property validly seized without a warrant, held:

> "In this case the search significantly increased the interference with privacy. As a factual matter it differed markedly from the initial seizure after which the contents of the suitcases remained undisclosed to the world."
>
> "Thus the search was unlawful because it intruded on an interest protected by the Fourth Amendment and because a warrant could have been readily obtained without prejudicing the need for effective law enforcement."

Id. at . Certainly the evidence sought to be suppressed in the *Hunt* case falls within the purview of this holding. The search made after the seizure, that is the playing of the tape, significantly increased the interference with privacy and it differed markedly from the initial seizure which was and is here held to be proper. After the initial seizure, the contents of the tape remained undisclosed and a warrant could have been readily obtained from the proper authority without impairing the ability of the police to enforce the law in this case.

The police had probable cause to stop and arrest Kelly and to seize the tape recorder and tape. "These were legitimate intrusions by way of seizure, but such legitimate intrusions by way of seizure do not topple like dominoes all remaining privacy interests in the personal effect." Page 12, *United States* v. *Soriano, supra.* The Fifth Circuit in *Soriano* also quoted the Supreme Court in *Chimel* v. *California, supra,*:

> "There is no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions

should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."

It is the holding and conclusion of this court that though the detention of Kelly, his arrest, and the seizure of the briefcase and the tape recorder were warranted by the circumstances and were all legitimate intrusions upon fourth amendment rights, the further intrusion of playing the seized tape was not justified.

Accordingly it is ORDERED that the defendants' motion to suppress the admission into evidence of the tape and the contents thereof be GRANTED. It is further ORDERED that this motion to suppress will be granted as to all evidence gathered as a result of the playing of the tape under the doctrine of *Silverthorne* v. *United States*, 251 U.S. 385 (1920) and *Wong Sun* v. *United States*, 371 U.S. 471 (1962). An order will be issued accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 14th day of November A.D. 1973.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

Filed Dec. 14, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Cr. No. 5-485

UNITED STATES OF AMERICA

v.

NELSON BUNKER HUNT and W. HERBERT HUNT

Petition for Reconsideration

Comes now the United States of America, by its undersigned attorneys, and hereby petitions this Honorable Court to reconsider and rescind its Order of November 14, 1973, and to deny the Motion to Suppress filed herein. The grounds for this Petition are set forth in the attached Memorandum filed herewith.

Dated:

Respectfully submitted,

FRANK D. MCCOWN
United States Attorney

By: R. H. STEPHENS
Attorneys for the United States

Filed Dec. 1, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Cr. No. 5-485

UNITED STATES OF AMERICA

v.

NELSON BUNKER HUNT and W. HERBERT HUNT

Order

This court entered its final order granting a motion to suppress certain evidence in the above case which final order was dated November 14, 1973. The United States of America has now filed with this court a petition for reconsideration.

The court has examined the government's petition and memorandum in support thereof and is of the opinion that such petition should be and the same is hereby DENIED.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 18th day of December A.D. 1973.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

Filed Jan. 15, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Criminal No. Cr 5-485

UNITED STATES OF AMERICA

v.

NELSON BUNKER HUNT and W. HERBERT HUNT

Notice of Appeal

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's order entered in this action on December 18, 1973, suppressing certain evidence of the government.

I, Frank D. McCown, United States Attorney for the Northern District of Texas, hereby certify that this appeal is not taken for the purpose of delay and that the evidence so suppressed is substantial proof of facts material in these proceedings.

/s/ FRANK D. McCOWN
Frank D. McCown
United States Attorney

Sworn to before me this 15th day of
January 1974.

U. S. District Clerk
Northern District of Texas

By LEE SULLIVAN
Deputy

Filed May 17, '74

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1142

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

NELSON BUNKER HUNT and W. HERBERT HUNT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before GEWIN, GODBOLD and CLARK, Circuit Judges

By the COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is denied.

W.G.
CC
JCE

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 74-1142.

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,

v.

NELSON BUNKER HUNT and W. HERBERT HUNT, *Defendants-Appellees*.

Dec. 23, 1974.

Defendants, charged with intercepting telephone communications, moved to suppress tape recorder seized by officer from automobile of employee of private investigation agency allegedly hired by defendants to perform electronic surveillance and to suppress evidence gathered as result of playing of tape. The United States District Court for the Northern District of Texas at Lubbock, Halbert O. Woodward, J., 366 F.Supp. 172, held that stop and search of the automobile were proper but that playing of tape violated defendants' Fourth Amendment rights and government appealed. The Court of Appeals, Goldberg, Circuit Judge, held that defendants had no expectation of privacy in the tape recorder and tape which they had never seen and which they did not know existed until after the disputed search and seizure, and that principal-agent relationship between defendants and investigators, although sufficient to imply culpability for agents' violation of wiretapping statute, was not sufficient to confer standing for Fourth Amendment purposes.

Reversed and remanded.

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Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

This case presents a troublesome question of standing to contest the legality of a police search and seizure of certain instruments of electronic surveillance allegedly employed by brothers Nelson Bunker Hunt and W. Herbert Hunt against a group of their own relatives and some employees of their father, H. L. Hunt. After indictment on charges of wilfully, knowingly and unlawfully intercepting and endeavoring to intercept wire communications of certain persons in violation of 18 U.S.C. §§ 2511(1)(a) and (2),[1] defendants filed a motion to suppress the disputed evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. After a hearing, the district court concluded that defendants had standing to contest the search and seizure and that a part of the search was in fact illegal, and accordingly granted the motion to suppress. Since we find no warrant in the Fourth Amendment for surrogate privacy, we believe that the district court erred in finding a sufficient nexus between the search and defendants' Fourth Amendment rights to confer standing to contest the police action. We must reverse.

Sometime in late October or early November, 1969, the defendant Hunt brothers allegedly contacted one Everett, the president of a Houston, Texas, private investigation

[1] 18 U.S.C. § 2511 provides, in pertinent part:

(1) Except as otherwise specifically provided in this Chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both. [Section two lists various exceptions to the general rule of section one.]

agency, regarding the possibility of employing his agency to perform electronic surveillance of certain residences in Dallas, Texas. The Hunts purportedly represented to Everett that they had been the victims of extensive embezzlement and desired to obtain information concerning suspected employees. Everett contacted McCann, an electronics expert, and asked him to travel to Dallas to make an estimate of the job requirements and costs. When McCann returned to Houston and reported his findings, Everett contacted the Hunts and the deal was consummated.

The electronic surveillance operation required the use of tape recorders and tapes, which McCann purchased at retail stores, and certain other paraphernalia, including telephone transmitters, most of which McCann manufactured himself. McCann engaged a man named Watson to install some of the electronic equipment on strategically-located telephone poles and in various rental automobiles which were parked on a rotated basis outside the target houses. McCann and Kelly, an employee of Everett's detective agency, worked in Dallas throughout late December, 1969, and early January, 1970, rotating the automobiles which McCann and Kelly would rent, use and then return to the various rental agencies. The pair also changed the tapes when necessary, "condensed" the original tapes—edited out extraneous telephone conversations— and gave the master tapes to defendants.[2] McCann returned to Houston on or about January 9, and at some point thereafter, Everett presented defendants with a bill for all expenses incurred by McCann, Kelly and Watson, including the cost of the equipment, auto rental fees and food and lodging expenses, and for the cost of the services of the three gentlemen. When defendants paid their bill, Everett

[2] The original tapes were erased and reused after their contents, as edited, had been transferred to the master tapes.

sent them an itemized receipt. Everett later paid McCann, Kelly and Watson for their services and reimbursed them for their expenses.

The spectacle of strange automobiles appearing and remaining unattended for some hours before being removed and replaced by other strange unattended autos did not pass unnoticed in the quiet Dallas suburb of Richardson, Texas, where one of the "suspected" Hunt employees lived. An alarmed neighbor alerted the Richardson police to the unusual activity on January 9 and the police began to surveill the surveillers. On January 16, 1970, after the police investigation of the matter had turned up some very suspicious circumstances relating to the recent activities of McCann and Kelly, but before the police were able to decide whether the pair were involved in the narcotics trade, a burglary ring, or the investigation of an unpleasant divorce, a Richardson police officer observed Kelly enter a suspected auto and drive away. The officer followed and indicated to Kelly that he should pull over; Kelly promptly did so.

After a brief conversation, the officer walked over to Kelly's vehicle, noticed a pile of newspapers on the floor, lifted the papers and discovered a tape recorder. He then arrested Kelly and the two men drove to a police station, where police officers proceeded to play one of the tapes without bothering to obtain a search warrant beforehand. The playing of the tape prompted an investigation which led to the indictment and conviction of McCann and Kelly on federal wiretap charges and to the indictment of defendants here.

The facts of the original search of Kelly's car were recounted at length by this Court in United States v. McCann, 5 Cir. 1972, 465 F.2d 147, cert. denied, 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154, and need not be repeated here; suffice it to say that we found that the officer who searched the

automobile had both Kelly's consent to search and probable cause to do so. The defendants here claim that our decision in *McCann* suffered from a lack of certain evidence which they have now supplied—evidence which tends to indicate that Kelly did not consent to the search of the auto and that the officer had no probable cause to search the vehicle in any case. The district court below found otherwise, 366 F.Supp. 172, and concluded that the stop and search of Kelly's auto were proper. The court also found, however, that the playing of the tape constituted a second search without a warrant, and that this search violated defendants' Fourth Amendment rights. Applying the fruit of the poisonous tree doctrine, Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; Silverthorne v. United States, 1920, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, the district court ordered that "all evidence gathered as a result of the playing of the tape" be suppressed. 366 F. Supp. at 183. Since defendants have no standing to contest either search, we pretermit further discussion of the legitimacy of those searches.

I

The requirement that a litigant have "standing" to contest a particular lawsuit is based upon the metaphysical notion that, in our adversary legal system, a court must be very certain that the parties before it have "a personal stake in the outcome of the controversy," Baker v. Carr, 1962, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678, so that each side will represent its particular interests to the best of its abilities and thus afford the court a fully-informed choice between two clearly-stated alternatives. *See* Flast v. Cohen, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947. In practice, of course, things do not always work out that way; many individuals and groups who are genuinely interested in a given controversy may be unable

to satisfy the traditional requirements for standing. For this reason, among others, the law of standing has been liberalized over the past decade in many areas to comport with the reality of litigant interest. *See, e.g.,* Data Processing Service v. Camp, 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184; Barlow v. Collins, 1970, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192; Flast v. Cohen, *supra;* Griswold v. Connecticut, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. At the same time, the policies supporting a standing requirement have retained sufficient vitality to ensure that litigants must show more than a *de minimis* interest before they will be admitted into the courtroom. *See, e. g.,* Sierra Club v. Morton, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636.

In some respects, the necessity of standing to object to unconstitutional searches and seizures is more anomalous than most standing requirements. The major rationale for the exclusionary rule, whereby evidence obtained in an unconstitutional manner may not be used in a criminal prosecution, is that only such a drastic means will effectively deter law enforcement officials from violating the Fourth Amendment rights of citizens. *See* Mapp v. Ohio, 1961, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; Weeks v. United States, 1914, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652.[3] Given this premise, one might suppose that any citizen should be able to apprise the courts of unconstitutional searches and seizures; otherwise, policemen might in some cases break the law with impunity. However that may be, there is no precedent for not demanding standing to question a search. The courts have settled upon a requirement of some "standing" to contest Fourth Amendment viola-

[3] For a lengthy critique of the deterrent efficacy of the exclusionary rule, *see* Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970); *see also* the dissent of Chief Justice Burger in Bivens v. Six Named Unknown Agents, 1971, 403 U.S. 388, 411, 91 S.Ct. 1999, 29 L.Ed.2d 619.

tions, reasoning that the added deterrent effect of a "no standing" or minimal standing rule in search and seizure cases would be of slight social value in comparison with the large social cost imposed by criminals who would take advantage of such a rule. Although as an abstract proposition of law, the standing requirement might not have logical primordialty, it does possess interpretative validity and solidity; it is not the case "that anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. United States, 1969, 394 U.S. 165, 174, 89 S.Ct. 961, 967, 22 L.Ed.2d 176, 187.

II

In order to determine the precise extent of the standing requirement as it applies in this case, we must first analyze just what demonstrable interests are requisite to standing; we must determine what individual rights and liberties the Fourth Amendment protects.

It is often aserted that the Fourth Amendment's function is to preserve and protect "the right of privacy" for all citizens. As is frequently the case with broad generalizations, this characterization says at once too much and too little. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment was enacted while the memory of British tyranny was fresh in the minds of the Founding Fathers. The British military had latterly become accustomed to taking whom or what they wanted at any time they wanted, and for any reason or no reason at all. This course of

official conduct did not find favor with a generation of Americans which accounted the rights of personal liberty and private property as the most valuable and basic of human expectations. The rights of liberty (including the right of privacy) and of property were not as clearly differentiated in the minds of eighteenth-century Anglo Americans as they are in modern estimation. Blackstone, for example, was of the opinion that property is the right to exclude,[4] and American jurisprudence preserved this conceptual unity of privacy and property for Fourth Amendment purposes for a very long time.

In Boyd v. United States, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, the United States Supreme Court held that a federal statute compelling production of certain private papers was an unconstitutional "invasion of [the defendant's] indefeasible right of personal security, personal liberty and private property" which struck at "the very essence of constitutional liberty and security". 116 U.S. at 630, 6 S.Ct. at 532, 29 L.Ed. at 751. *Boyd* was an affirmation of the principle that some things cannot be searched or seized regardless of whether a proper procedure is followed, that a search of private papers is *per se* an "unreasonable search." This doctrine of absolute immunity of certain types of personal property from search or seizure was not undone until 1914, when the Supreme Court, in Weeks v. United States, *supra*, adopted the exclusionary rule and substituted a concern for proper procedure for the former concern for the nature of the thing searched or seized. Even after *Weeks*, the philosophical legacy of

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[4] "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." Blackstone, Commentaries, Book II, Chapter I. *See also* the famous opinion of Lord Camden in Entick v. Carrington, 1765, 19 How. St. Trials.

Blackstone and *Boyd* was so firmly implanted in the collective consciousness of American courts that instrumentalities of a crime could not be seized until 1921, Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647, and "mere evidence" of a crime could not be seized until 1967. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782.

The procedural revolution begun in *Weeks* has taught us that the Amendment builds no impermeable barrier between an individual's person, house, office, automobile or strongbox and the outside world. If law enforcement officials follow the proper procedures to ensure that they can demonstrate sufficient interest in a particular person, place or thing, then they may seize and examine the object of their investigation.

Perhaps the fact that policemen can now, under the proper conditions, search and seize anyone or anything has compelled the courts to make a careful study of which search procedures are repugnant to those widely-held concepts of personal security and dignity which have been subsumed into the "right of privacy." It is this study which led to Justice Stewart's comment in Katz v. United States, 1967, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582, that "the Fourth Amendment protects people, not places." This part of the Fourth Amendment inquiry has required a determination, not of what privacy is—for everyone assumes agreement on that point[5]—but of whether a given individual in a given situation could have a reasonable expectation of privacy in the particular place or thing searched. So it was that in Jones v. United States, 1960, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the Supreme Court determined that an invitee had a cognizable privacy

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[5] Justice Stewart defines the "*general* right of privacy" as an individual's "right to be let alone by other people." Katz v. United States, *supra*, 389 U.S. at 350-351, 88 S.Ct. at 511, 19 L.Ed.2d at 581. *See* Fried, "Privacy," 1968, 77 Yale L.J. 475.

interest in preserving the apartment in which he was a guest from unlawful intrusion by the police. In Katz v. United States, *supra*, the Court ruled that an individual has a significant privacy interest in insulating his own telephone conversations from electronic monitoring, whether he makes his calls from his own home or from a public telephone booth.

If modern Supreme Court interpretations of the Fourth Amendment are dominated by the concept of the right of privacy, the Court has not foresworn an examination of property rights in order to determine the presence or absence of privacy interests. Although the Court announced in Warden v. Hayden, *supra*, "[t]he premise that property interests control the right of the Government to search and seize has been discredited," 387 U.S. at 304, 87 S.Ct. at 1648, 18 L.Ed.2d at 790, that same Court determined two years later in Alderman v. United States, *supra*, that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his house, even though he himself was not a party to those conversations.[6]

In summary, although the right of privacy has been the major theme of modern Fourth Amendment jurisprudence, the property rights rationale cannot be ignored altogether.[7] Perhaps it would not be too much to say that the continuing concern with property rights is prompted by the re-

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[6] Justice Harlan objected strenuously to this reliance on the property underpinnings of the Fourth Amendment, and would have preferred to rely on the "substantive principles developed in *Katz*." 394 U.S. at 191, 89 S.Ct. at 976, 22 L.Ed.2d at 197.

[7] As Justice Black noted in dissent in Griswold v. Connecticut, *supra*, "[t]he average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . ." 381 U.S. at 509, 85 S.Ct. at 1695, 14 L.Ed.2d at 530.

alization that an individual often has a very reasonable expectation of privacy in his private property, and that it is this expectation which the Fourth Amendment protects. There may be a cognizable Fourth Amendment interest in the absence of a traditional property right, but it is almost certainly true that property rights cannot support a Fourth Amendment claim in the absence of a reasonable expectation of privacy in the property involved. Such an analysis would go far in explaining the Court's tendency in the last fifteen years to discard traditional property concepts in search and seizure cases where, as in *Jones, Hayden* and *Katz,* those concepts seem no longer to reflect modern expectations of privacy in the place or thing in question, and the willingness of the Court to rely on those same property concepts where, as in *Alderman,* the common law continues to reflect modern ideas of personal dignity and security.

III

We have discussed the logical and constitutional bases of the standing requirement in Fourth Amendment cases; we now address ourselves to an examination of the case law on the subject. Since this action comes to us in the posture of an appeal of an order suppressing evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, we begin with an exposition of that Rule, which provides in pertinent part that:

> A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant . . .

The Supreme Court held in Jones v. United States, *supra,* that in order to qualify as a "person aggrieved by an unlawful search and seizure" for purposes of Rule 41(e), "one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished

from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U.S. at 261, 80 S.Ct. at 731, 4 L.Ed.2d at 702.

Since *Jones*, the development of the law of standing in Fourth Amendment cases has turned on whether the defendant in question was a "victim" of the search, the "one against whom the search or seizure was directed." Generally, a defendant satisfies the standing requirement if he has an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy. Ownership usually constitutes such an interest, United States v. Banks, 5 Cir. 1972, 465 F.2d 1235, cert. denied, 409 U.S. 1062, 93 S.Ct. 568, 34 L.Ed.2d 514, but a reasonable expectation of privacy in the enjoyment of a place or object may attach where there is little or no proprietary interest. In *Jones*, for example, the defendant was present as a common law "invitee" in the apartment of a friend, when police performed an illegal search of the apartment. The Court awarded the defendant standing even though his common law possessory interest did not amount to much, because he was legitimately on the premises, and thus had a privacy interest in the apartment.[8] The *Jones* Court merely enunciated the unremark-

[8] Many standing cases since *Jones* have concerned themselves with the phrase "legitimately on the premises." For example, an individual who has paid for his hotel room has a reasonable expectation of privacy in that room, Garza-Fuentes v. United States, 5 Cir. 1968, 400 F.2d 219, cert. denied, 1969, 394 U.S. 963, 89 S.Ct. 1311, 22 L.Ed.2d 563; one who hides from the police in a hotel room for which he has not paid, however, has no standing to contest a search of the room. United States v. Gregg, 6 Cir. 1968, 403 F.2d 222, aff'd, 1969, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442. Although this distinction might seem to turn on a comparison of the property interests involved, the property interests are really only indicators of the various expectations of privacy peculiar to each situation. *See* Baker v. United States, 1968, 131 U.S.App.D.C. 7, 401 F.2d 958.

able proposition that an individual may have a reasonable expectation of privacy in a place other than his own home. In this tradition, in Mancusi v. DeForte, 1968, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154, the Supreme Court found that an individual could reasonably expect freedom from governmental intrusion into his working area, even though he shared parts of an office with others. Conversely, a defendant cannot claim standing if he neither has a cognizable property interest in the place or thing searched, nor was he present at the time of the search. United States v. McConnell, 5 Cir. 1974, 500 F.2d 347; United States v. Palazzo, 5 Cir. 1974, 488 F.2d 942; United States v. Sullivan, 5 Cir. 1973, 488 F.2d 138.

In *Jones*, the Court also created the doctrine of "automatic standing," whereby, in a case where possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge admission of the evidence.[9]

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[9] The Court adopted the *Jones* rule in order to eradicate the unseemly practice whereby prosecutors would deny at the suppression hearing that a defendant charged with a possessory offense actually owned the disputed evidence, thereby forcing the defendant to claim ownership; the prosecutor would then confront the hapless defendant at trial with his claim of ownership made at the suppression hearing. *Jones* enabled a defendant in such a case to contest a search without admitting ownership. In Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, however, the Court held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment Grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt. Although *Simmons* appears to have removed much of the opportunity for the sort of abuse at which the *Jones* rule is aimed, and although the Court has recently cast some doubts on the continued vitality of *Jones*, Brown v. United States, 1973, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208, the rule is still the law.

One of the most significant aspects of the law of standing in search and seizure cases, and one that clearly reflects the intensely personal nature of Fourth Amendment rights, is the rule that interpersonal relationships cannot make a "victim" of one who is not otherwise "one against whom the search or seizure is directed." Generally speaking, the Fourth Amendment protects the "I" but not the "thou." So it is that one spouse may not complain if the other is searched. United States v. Altizer, 5 Cir. 1973, 477 F.2d 846; *but see* Alderman v. United States, *supra*, 394 U.S. at 193-194, 89 S.Ct. at 977, 22 L.Ed.2d at 198 (Harlan, J., concurring in part and dissenting in part). Nor may one business partner assert an interest in the search of another partner solely on the basis of the partnership relation. United States v. Frick, 5 Cir. 1973, 490 F.2d 666. Finally, Alderman v. United States, *supra*, dictates that co-defendants and co-conspirators may not assert the Fourth Amendment rights of their alleged partners in crime solely on the basis of their interpersonal association, because Fourth Amendment rights are personal ones. See United States v. Sullivan, *supra;* Granza v. United States, 5 Cir. 1967, 377 F.2d 746. Since co-defendants and co-conspirators can often make out some semblance of a property right in the sorts of things that might be searched and seized from their cohorts, *Alderman* demonstrates once again the primacy of privacy in the modern Fourth Amendment schema.

The Supreme Court has recently restated the law of standing in search and seizure cases, in Brown v. United States, 1973, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208. In *Brown*, two defendants were convicted of conspiring with a third individual to transport stolen goods in interstate commerce. Evidence obtained from an allegedly unlawful search of the co-conspirator's premises was admitted in the separate trial of the other two defendants. The Court, relying on *Alderman*, concluded that the dis-

puted evidence was rightfully admitted against defendants, who alleged a possessory interest in neither the premises searched nor the merchandise seized:

> [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure . . ." 411 U.S. at 229, 93 S.Ct. at 1569, 36 L.Ed.2d at 214.

Although the rule of standing applied to the specific facts of *Brown* might appear at first glance to be somewhat more restrictive than previous formulations with respect to the search and seizure of objects, the Court's later remark that defendants "failed to allege any *legitimate* interest of any kind in the premises searched or the *merchandise seized*," 411 U.S. at 229, 93 S.Ct. at 1569, 36 L.Ed.2d at 214 (emphasis added), clearly indicates that *Brown* conforms to the general rule of standing, and that the Court has not neglected the language in the Fourth Amendment concerning "papers, and effects." *See* United States v. Groner, 5 Cir. 1974, 494 F.2d 499, cert. denied, —— U.S. ——, 95 S.Ct. ——, 41 L.Ed.2d ——. *Brown* concisely states the rule of standing in Fourth Amendment cases: defendants must demonstrate a "legitimate interest" of some kind in the premises searched or the objects seized. That interest may or may not be founded on some common law proprietary interest; the decisive factor in determining whether a search or seizure is "reasonable" for Fourth Amendment purposes is whether the complaining party's reasonable expectations of privacy have been unreasonably disturbed.

IV

Defendants here were not present at the search in question, nor are they charged with a possessory offense, so that they cannot claim either of those bases for standing. Rather defendants contend that they may contest the search on three other grounds: 1) their possessory interest in the seized tape recorders and tapes; 2) their agency relationship with McCann and Kelly; and 3) the prohibitions of the Texas search and seizure statute, coupled with the federal policy giving full effectuation to state exclusionary rules. We will examine these contentions in turn.

Defendants claim that their proprietary interest in the tape recorders and tapes is sufficient to bring them within the well-established rule conferring standing upon individuals having a possessory interest in the place or object searched or seized. Because their bill from Everett included the cost of every item seized, defendants claim title to every tape recorder and tape used in the operation. They point to the testimony of McCann and Everett at the suppression hearing below, to the effect that the equipment "belonged to the Hunts," as irrefutable evidence of their possessory interest in the electronic surveillance equipment. Finally, defendants rely on our recent decision in United States v. Banks, *supra*, for the proposition that legal title to an object always conveys standing to complain of a search thereof.

The first major difficulty with defendants' argument is that their claim of ownership is a very tenuous one. The record demonstrates that Everett and McCann occupied a contractual position in relation to the Hunts that is very close to the common law notion of an "independent contractor."[10] Defendants contacted Everett about doing a

[10] For an exposition of the conflicting and confusing development of independent contractor law, *see* Comment, "Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule," 1973, 40 U.Chi.L.Rev. 661.

job for them; Everett consulted McCann, who determined how the job could best be completed and how much it would cost; the defendants agreed to the price proposed by Everett, and had no more to do with the operation until they paid the bill. Everett had already retained Kelly as an employee of his detective agency; McCann hired Watson as a specialist. McCann and Kelly purchased every item of equipment with their own financial resources, paid for every rental car, every motel room, every meal with their funds, and were reimbursed by Everett upon completion of the project. Defendants never saw any of the equipment, either during or after the operation, except for certain master tapes, none of which were taken in the disputed search and seizure.

Whether an individual is a servant or an independent contractor depends upon whether the employer has a right to control the details of the work, Strangi v. United States, 5 Cir. 1954, 211 F.2d 305; Newspapers, Inc. v. Love, Tex. 1964, 380 S.W.2d 582, and the record does not show that the defendants at any time had any desire to interfere or could have interfered with the operation as planned by McCann and Everett and enacted by McCann, Kelly and Watson. The nature of the contractual relationship between Everett and McCann on the one hand and defendants on the other, makes defendants' claim to ownership of the tape recorders and tapes a diaphanous one at best.

Whatever title defendants may possess in the disputed evidence, we cannot help but reflect that this discussion of master and servant law and legal title has taken us very far from the substance of Fourth Amendment rights. As we have indicated above, the constitutional right of protection against unreasonable searches and seizures attaches only when an individual's reasonable expectation of privacy is shattered by illegal Government intrusion. Whatever minimal possessory interest defendants may have in the seized equipment, we have been unable to discern the

slightest privacy interest that defendants could reasonably assert in objects which they have never seen and of whose particular existence they were unaware until after the disputed search and seizure. If *Jones, Katz, Alderman* and *Brown* teach us anything, they indicate that common law notions about proprietary relations offer no *per se* rules in search and seizure cases; a naked assertion of possessory interest may be indicative but cannot be dispositive of the existence of a cognizable privacy interest in the place or thing searched. In the absence of a demonstrable expectation of privacy in the tape recorders and tapes, defendants can have no standing to protest the search and seizure. They may not vicariously assert the Fourth Amendment rights of McCann and Kelly.

There is nothing in our *Banks* case which confers standing upon defendants. In that case, Adams, Banks, Moody and George operated a counterfeiting ring. Banks purchased the printing press and certain other equipment; Moody furnished a garage to house the press; Adams, Banks and George operated the press; George distributed the counterfeit currency; Adams, Banks and George took equal shares of the proceeds. George was apprehended in the act of distributing some of his artwork, and gave information that led to the issuance of a warrant to search Moody's garage, which search led to the discovery of the press, the arrest of Adams and Banks, and the claim of the latter two individuals that the warrant was unconstitutionally defective. We held that Adams had no standing to object to the search, because he was not present at the time of the search and had no possessory interest either in Moody's garage or in the printing press. On the other hand, we found that Banks certainly had standing to object to the seizure of a press which he had purchased directly with his own funds (for which he had not been reimbursed by his partners in crime) and which he had operated in the course of the common criminal scheme. There was in

Banks no dispute as to the full measure of Banks' title to the press, nor any controversy as to his direct and enduring relationship to the machine. In short, there was in *Banks* that affirmative showing of reasonable expectation of privacy in the seized equipment that is so lacking here.

A case which is much more analogous to the present controversy than *Banks* is United States v. Johnson, 5 Cir. 1972, 456 F.2d 295. In *Johnson,* defendant had paid one Langner $450 to travel to Mexico, purchase marijuana from a pre-arranged contact and return the marijuana to him in the United States. Langner was stopped on his return to this country, the marijuana discovered and seized, and Johnson arrested. We found that Johnson had no standing to challenge the search for want of a sufficient privacy interest in the marijuana; he was not the individual at whom the search was aimed. Johnson's possessory interest in the seized marijuana was arguably greater than that of defendants here in the disputed electronic equipment because Johnson had arranged all the details of the operation and expected to receive the marijuana upon Langner's safe return; none of these things can be said about defendants in this case.

Defendants also argue that they must be awarded standing of the *Jones* variety in order to prevent the Government from contending on the one hand that defendants are responsible as principals for the violations by their agents McCann and Kelly of the federal wiretapping statute, while avowing on the other hand that this same principal-agent relationship does not suffice to confer standing upon defendants to contest a search of their agent Kelly's auto and electronic equipment. There is no merit in this argument.

This is not a case, as *Jones* was, where the Government's contradictory allegations create a cruel dilemma whereby

a defendant accused of a possessory offense must either incriminate himself at the suppression hearing or waive his opportunity to have illegally-obtained evidence suppressed. Defendants here are placed in no such dilemma by unfair prosecutorial tactics. There is in fact nothing contradictory about the United States' argument in this case; a principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes. Defendants' contention flies directly in the face of *Alderman*, where the Supreme Court held that co-defendants and co-conspirators do not possess standing to object to searches of their compatriots solely on the basis of their criminal relation.

Although there may well be cases in which a principal may object to a search of his agent's papers or effects, this is not one of them. Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* and *Brown* forbid. If we were to adopt the position urged by defendants, any criminally-inclined individual could earn a double dividend by hiring private investigators to complete his schemes: not only could the principal disassociate himself from any physical unpleasantness or risk involved in the criminal activity and at the same time cover his own tracks, but he could claim a privacy interest in any instrumentalities of the crime, no matter whether he had the slightest idea of the existence of such instrumentalities before the unpleasant epiphany of arrest.

Finally, defendants claim standing by virtue of Texas law and the Supreme Court's decision in Elkins v. United States, 1960, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669, to forbid federal courts to utilize evidence which would be excluded in state courts by operation of a state exclusion-

ary rule. Article 38.23 of the Vernon's Ann. Texas Code of Criminal Procedure provides that:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. . . .

As defendants correctly point out, Article 38.23 is a broad state exclusionary rule. *See* Mapp v. Ohio, *supra*. Defendants argue that the disputed evidence here was illegally obtained, so that it would be inadmissible in Texas courts, and that the rule of *Elkins* forbids federal courts to admit evidence that state courts would thus exclude:

> [W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. . . . 364 U.S. at 221, 80 S.Ct. at 1446, 4 L.Ed.2d at 1680.

Defendants contend that Texas is so desirous of deterring its law enforcement officers from making illegal searches and seizures that Article 38.23 minmizes, if not eschews, standing requirements in state cases. From this premise, defendants conclude that *Elkins* prevents federal courts from requiring standing in Texas search and seizure cases where, as here, Texas officers are involved.

Defendants cite us no Texas cases in support of their novel proposition, and with good reason: Texas law requires standing in search and seizure matters, and this state requirement differs in no material respect from the federal law of standing as outlined above. Stiggers v. State,

Tex.Cr.App. 1974, 506 S.W.2d 609; Clemons v. State, Tex. Cr.App. 1973, 501 S.W.2d 92; Booth v. State, Tex.Cr.App. 1973, 499 S.W.2d 129. Texas law confers no standing upon defendants here.

We have carefully examined the record and considered the defendants' various arguments. Neither the one nor the others convince us that defendants enjoyed a reasonable expectation of privacy in the disputed evidence. Under the rule of *Johnson*, and of *Jones, Katz, Alderman* and *Brown*, the Hunts cannot be said to be "aggrieved" by the searches of Kelly's automobile and the tapes; neither search was in any way directed at the defendants. To hold otherwise would stand these precedents on their heads. Fourth Amendment guarantees partake of a privateness which is not subject to barter or bailment. There is no standing room for persons positioned as defendants under the Fourth Amendment as elucidated in the exegesis of our judicial forebearers.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 74-1142

D. C. Docket No. CR 5-485

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NELSON BUNKER HUNT AND W. HERBERT HUNT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before RIVES, GEWIN AND GOLDBERG, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREFORE, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

December 23, 1974

Issued as Mandate:

18 U.S.C. § 3731

CHAPTER 235—APPEAL

§ 3731. Appeal by United States.

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

As amended Jan. 2, 1971, Pub.L. 91-644, Title III, § 14(a), 84 Stat. 1890.

18 U.S.C. § 2511

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication knowing or having reason to know that the information was obtained through the interception of

a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.